



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

March 29, 1996

The Honorable Kim Brimer  
Chair  
Committee on Business and Industry  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Letter Opinion No. 96-038

Re: How the Texas Peace Officers' Advisory Committee may enforce the requirement that funds solicited for the Texas Peace Officers' Memorial be deposited in a special account established for that purpose, and related questions (ID# 37190)

**Dear Representative Brimer:**

You have asked this office certain questions regarding the raising of funds for the Texas Peace Officers' Memorial. The Texas Peace Officers' Advisory Committee, which is established by subchapter F of chapter 415 of the Government Code, is "established to advise the [Texas Commission on Law Enforcement Officer Standards and Education ('TCLEOSE')] on funding, design, construction, updating, maintenance, and management of a Texas peace officers' memorial on the grounds of the Capitol Complex in honor of those Texas peace officers who have died in the line of duty." Gov't. Code § 415.112.

Your questions generally concern section 415.120 of the Government Code, which deals with the funding of the Peace Officer's Memorial. Section 415.120(a), as amended by the Seventy-fourth Legislature, reads in relevant part:

All funds contributed for the Texas peace officers' memorial shall be deposited in the state treasury to the credit of a separate interest-bearing fund account established for the peace officers' memorial. Any entity that collects funds for the Texas peace officers' memorial or solicits funds in any way giving the impression that the proceeds or funds are for the benefit of the Texas peace officers' memorial shall send that money to the comptroller to be deposited in the fund account not later than the 30th day after the date on which the money was collected.

Act of May 16, 1995, 74th Leg., R.S., ch. 240, § 5, Tex. Sess. Law Serv. 2148, 2149.

The second sentence of section 415.120(a), concerning the thirty-day deadline, was added to the statute by an amendment which became effective on September 1, 1995. The first sentence has in substance been part of the statute since its adoption in 1989. See Act of May 18, 1989, 71st Leg., R.S., ch. 131, § 1, 1989 Tex. Gen. Laws 491, 491-93.

Your first two questions concern the same issues, but ask about them with respect to events occurring before and after the effective date of the amendment to section 415.120. Since we believe that our answer is the same in either case, we shall answer with regard to events since the effective date of the amendment.

You ask, then, what penalty there would be if an entity purported to raise funds for the memorial, yet failed to turn over such funds to the comptroller to be deposited in the special account mandated by section 415.120(a). The statute itself is silent as to any such sanctions.<sup>1</sup> Accordingly, we must look elsewhere in statutes or common law to discover any available sanction.

The Office of the Attorney General has authority under the Texas Deceptive Trade Practices Act, Business and Commerce Code sections 17.41 through 19.47, to bring actions against fund raisers who engage in false, misleading, or deceptive acts. A claim that one was soliciting money for a particular charitable purpose, such as the Peace Officers' Memorial, while one in fact was retaining possession of such money for one's own use and benefit, would in all likelihood constitute such a deceptive trade practice.

Moreover, such gifts as those contemplated by the statute would constitute a charitable trust under the terms of section 123.001(2) of the Property Code. The attorney general, through the Charitable Trusts Section of the Consumer Protection Division, routinely brings suit to enforce such trusts. See *Boyd v. Frost Nat'l Bank*, 196 S.W.2d 497, 502 (Tex. 1946) (duty of attorney general to invoke inherent powers of courts to prevent abuse of charitable trust); *Nacol v. State*, 792 S.W.2d 810, 812 (Tex. App.--Houston [14th Dist.] 1990, writ denied) (attorney general as public representative proper party to maintain suit to enforce charitable trust).

You further ask, "[I]f such money is placed in an interest-bearing account, is the interest earned on such funds also a fund due and payable to the Memorial fund account?" In an action to enforce a charitable trust, on a theory that such funds were held in trust for the memorial fund and that their possessor would be unjustly enriched by continuing to possess them, it would be the position of this office that any interest generated by the funds ultimately belonged to the memorial fund account. If the person in possession of the funds would be unjustly enriched by having the use and benefit of the original money, he would therefore be unjustly enriched by having the use and benefit of interest generated by it. Accordingly, we answer your question in the affirmative.<sup>2</sup>

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<sup>1</sup>We presume that your concern is with the remedies available to the Peace Officers' Advisory Committee and TCLEOSE, rather than any cause of action available to donors to whom false or misleading statements were made concerning the intended beneficiaries of their largesse, upon which the donors relied to their detriment. Such donors would seem to have damage actions available for fraud against those persons who had made such statements.

<sup>2</sup>We note that in the opinion process we can only speak generally of potential remedies. The institution of any particular action would depend on the resolution of any number of possible questions of

You further ask a series of questions dealing with the authority of TCLEOSE and the advisory committee to hire and pay a fund-raiser to aid in acquiring funds for the memorial. You ask:

Does the Commission on Law Enforcement Officer Standards and Education, with advice from the Texas Peace Officers' Memorial Advisory Committee, have the authority to contract with a private consultant or fund raising firm to solicit funds from private or public contributors? If yes, can the fee charged by the consultant or firm be paid from the contributed funds? If yes, can the consultant be paid prior to the deposit of the funds into the account with the State Treasury?

As to TCLEOSE's power to contract with a fund-raiser, we believe that is specifically authorized by section 415.117(a)(5), which delineates as among the advisory committee's duties advising TCLEOSE on "selecting individuals or organizations to provide fund-raising services." Section 415.117(a)(5), in our view, clearly contemplates that TCLEOSE, with the advice of the committee, may contract with a fund-raiser to provide fund-raising services.

You next ask whether fees to the fund-raiser may be paid from the contributions. The answer to this question depends on the interpretation of section 415.120(b):

Money in the fund may be used only by the commission with the advice of the advisory committee for the purposes specified in section 415.112 and may not be used by the commission for any commission expenses.

The question thus becomes whether the payment of a fund-raising consultant is a payment "for the purposes specified in section 415.112" or a "commission expense." Section 415.112, as we have already noted, outlines the purposes of the committee as "to advise [TCLEOSE] on *funding*, design, construction, updating, maintenance, and management of a Texas peace officers' memorial." (Emphasis added.) Funding, then, is one of the specified purposes, and we believe a court would most likely hold that the payment of a fund-raiser was a reasonable expense for that purpose.<sup>3</sup>

You ask finally whether a fund-raiser may be paid before the deposit of the funds in the account mandated by section 415.120. Section 415.120(a) mandates that "[a]ll funds" shall be deposited in the treasury and that "[a]ny entity" collecting such funds must

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(footnote continued)

fact which are not before us, and on which we could not judge in an advisory opinion of this sort even were they before us.

<sup>3</sup>You do not ask, and we do not consider, whether any particular payment arrangement might be so large in relation to the funds collected as to constitute an abuse of discretion.

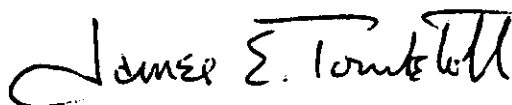
send such money to the comptroller. Given this mandatory language, we do not believe that trust funds may be used to pay a fund-raiser prior to their receipt into the special treasury account.

### **S U M M A R Y**

While section 415.120 of the Government Code is silent as to how its requirement that funds solicited for the Texas Peace Officers' Memorial be deposited in a special account in the state treasury shall be enforced, the Office of the Attorney General through the Charitable Trusts Section of its Consumer Protection Division has authority under the Texas Deceptive Trade Practices Act, Texas Business and Commerce Code sections 17.41 through 19.47, and chapter 123 of the Property Code to bring an action to enforce the charitable trust created by such contributions. The interest on such funds, like the principal, is ultimately the property of the fund for the peace officers' memorial.

The Texas Commission on Law Enforcement Officer Standards and Education, with the advice of the Texas Peace Officers' Advisory Committee, has the authority to contract with a fund-raiser for the solicitation of contributions to the memorial fund. Payment of fees for such services is for a purpose authorized by the statute. Trust funds may not be used to pay a fund-raiser prior to their receipt in the special treasury account.

Yours very truly,

A handwritten signature in black ink, appearing to read "James E. Tourtelott". The signature is fluid and cursive, with a large initial "J" and a stylized "T".

James E. Tourtelott  
Assistant Attorney General  
Opinion Committee